Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Carriage of Digital Television Broadcast Signals	CS Docket No. 98-120
Amendments to Part 76 Of the Commission's Rules	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	
Local Broadcast Signal Carriage Issues	CS Docket No. 00-96
Applications of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	CS Docket No. 00-2

To: The Commission

JOINT COMMENTS OF THE FILIPINO CHANNEL, THE GOLF CHANNEL, THE INSPIRATIONAL NETWORK, OUTDOOR LIFE NETWORK, SPEEDVISION NETWORK, AND THE WEATHER CHANNEL, INC.

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SPEEDVISION NETWORK L.L.C.
THE WEATHER CHANNEL, INC.

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ABS-CBN International, Inc. d/b/a The Filipino Channel ("The Filipino Channel"), TGC Inc. d/b/a The Golf Channel ("Golf"), The Inspirational Network, Inc. ("INSP"), Outdoor Life Network, L.L.C. ("OLN"), Speedvision Network, L.L.C. ("Speedvision"), and The Weather Channel, Inc. ("TWC") (collectively referred to herein as "Commenters") submit these Comments in response to the Further Notice Of Proposed Rulemaking issued by the Federal Communications Commission ("Commission") concerning the Carriage Of Digital Television Broadcast Signals ("FNPRM").

I. INTRODUCTION AND SUMMARY

Commenters, a group of diverse program networks, jointly oppose the extension of the Cable Act's must carry requirements to broadcasters' digital broadcast signals, even for a truncated period. Any dual carriage requirement would further reduce extant cable system channel capacity and force cable operators to drop cable program networks or to shift them to low-penetrated digital tiers, and to deny carriage to new and emerging networks. As a result, many program networks would fail; others would be forced to slash programming budgets and possibly forego the creation of original, high quality programming and the introduction of new interactive services; and many new and proposed networks would never see the light of day because the absence of channel capacity would reduce the incentive for launch of new networks. Programming diversity, long sought by Congress and the Commission and recognized by the Supreme Court as a government purpose of the "highest order," would suffer, and consumers would be deprived of diverse, quality programming.

Over 280 national satellite-distributed networks are delivered to viewers on cable systems today, and more than 65 additional networks are planned to launch this year. These networks are dependant upon broad distribution on cable systems in order to become and remain commercially viable. Increased distribution leads to increased affiliation fees and advertising revenues, which in turn are needed to cover the substantial costs associated with producing a quality program network. Today, non-pay program networks generally must reach at least 20 million subscribers to achieve break-even, and most business plans require networks to reach at least 30 million subscribers to sustain profitable operation. And, while pay and non-profit services operate under somewhat different business models, subscriber penetration is still vital to their economic health.

Despite recent cable system upgrades, program networks, such as Commenters, still must compete vigorously for carriage. Even established program networks often must offer a combination of perks to secure carriage, including low rates, free service periods, and launch support. Much of the added bandwidth realized through upgrades is being used for services other than traditional video programming, including high-speed Internet service, interactive and enhanced services, and telephony. Other regulatory requirements, such as must carry, leased access and PEG access, further limit the amount of channel capacity available to networks. Any further reduction in channel capacity would cause many planned networks to be cancelled and new networks to fail, and would significantly impact the financial performance and production quality of established networks seeking to maintain and/or expand subscriber penetration.

A dual carriage requirement would essentially displace diverse, high-quality cable networks with redundant broadcast programming that otherwise would not be carried in a competitive marketplace. And yet, in bringing about that result, Congress' goals for must carry would not be satisfied. A dual carriage requirement would not ensure the availability of free over-the-air broadcasting, as the overwhelming majority of Americans cannot yet receive digital broadcast signals over the air. Nor would a dual carriage requirement promote "the widest possible dissemination of information from diverse and antagonistic sources;" indeed, program diversity would suffer. Thus, the delicate balance that salvaged the must carry rules in *Turner* would no longer prevail, and consequently the dual carriage requirement under consideration could not survive constitutional challenge.

If broadcasters produce high quality programming services of interest to the public, cable operators will carry them. This is evidenced by the recent agreements between Time Warner and WRAL-TV, the local CBS affiliate in Raleigh, North Carolina, as well as Time Warner's agreement with PBS. Cable operators should not be forced to subsidize the broadcast industry, especially at the expense of less favored cable program networks, nor should broadcasters be entitled to the scant channel capacity for which program networks must compete. Likewise, a Commission decision to allow broadcasters to use the "must carry rules" for multiplexing purposes, or even a broad interpretation of "program related" services, would give broadcast networks an unfair advantage over cable program networks, such as Commenters.

It is for all of these reasons that Commenters join here to urge the Commission to refrain from imposing a dual carriage requirement.

II. IDENTIFICATION OF COMMENTERS

Commenters are a group of networks that offer diverse genres of programming targeted to specific audiences and provide a level of in-depth coverage of each of their respective niche subject areas that is not currently offered by broadcasters, and would not be offered on broadcasters' primary signals if a dual carriage requirement were imposed.[1]

[1] Golf, OLN and Speedvision, along with other new networks, filed comments in response to the first NPRM in the above captioned proceeding on October 13, 1998 ("Original Comments of Golf, OLN and Speedvision"). The Filipino Channel also filed comments in response to the first NPRM on October 13, 1998, along with five other ethnic-genre networks. TWC filed comments on October 18, 1998 and reply comments on December 22, 1998.

A. The Filipino Channel

ABS-CBN International, Inc. launched The Filipino Channel on April 3, 1994. It is the only Tagalog-language programming service in North America. The channel originates live from Manila 24 hours a day, and produces wholesome entertainment and extensive public-service programs that cater to all aspects of Filipino life, including news, educational programming, movies, comedy and game shows, and talk shows. The Filipino Channel also offers its subscribers a 24-hour news channel (Sarimanok News Network) and a 24-hour movie channel (Pinoy Blockbuster Channel.) Programming on the Filipino Channel is 83 percent Tagalog and 17 percent English. The channel is now seen in approximately 59 thousand households across North America and is carried on 46 systems throughout the United States and Puerto Rico. DBS provides The Filipino Channel to 58 percent of the network's viewing base, while the other 42 percent of its subscribers are from cable. Approximately 5 percent of the Filipino Channel's distribution is analog cable, while the rest is digital.

B. The Golf Channel

The Golf Channel was launched in January 1995, and currently distributes its programming to over 32 million subscribers within the United States. Of those subscribers, almost 90 percent are cable subscribers, with approximately 17 percent of those subscribers coming from digital cable subscriptions. The Golf Channel is the only 24-hour network devoted exclusively to golf programming, offering new and unique programming tailored to golf enthusiasts. Golf provides in depth coverage of more than 90 professional golf tournaments from around the world—more than all other broadcast networks combined. The channel also features other golf-related programming, including in depth looks at the players and new original programs broadcast from Golf's studios in Orlando, Florida. Golf's original programming includes instructional programs for all ages and abilities, hosted by top golf professionals, as well as "Golf Central," a CableAce award-winning nightly golf news show.

C. INSP – The Inspiration Network

INSP, which launched in 1990, provides value-based, religious programming to approximately 15 million cable subscribers on analog channels. INSP offers more than 845 different programs monthly, which programs are produced by INSP as well as more than 80 different religious organizations, including 23 different minority organizations. These organizations represent more than 20 different religious denominations. INSP has state-of the-art production facilities in Charlotte, North Carolina, where it produces its own original programming. INSP also offers high quality programming targeted to teens and children. In 1998, INSP launched a new network, Inspirational Life ("i-Lifetv"), which offers value-based lifestyle programming and a daily 8-hour block of Hispanic programming. i-Lifetv is distributed on cable system digital tiers to approximately 2 million cable television subscribers. INSP is considering launching additional new networks and plans to integrate interactive ("ITV") applications into its programming as ITV technology is more widely deployed at cable headends.

D. Outdoor Life Network

Outdoor Life, which launched in June 1995, serves approximately 35 million subscribers. Outdoor Life distributes its programming primarily on cable system analog channels with less than 20 percent of Outdoor Life's subscribers receiving the service on a digital tier. DBS and other MVPDs comprise less than 30 percent of the network's total distribution. The network is targeted at outdoor enthusiasts, a previously underserved audience, and its programming focuses on outdoor and environmental activities and interests, such as wildlife and wilderness conservation, fishing, mountaineering, hunting, camping, backpacking, mountain biking, white water sports and skiing, including its Emmy Award-winning series *Adventure Quest*. Outdoor Life provides live, in-depth coverage of events such as skiing, snowboarding, equestrian, and bicycle competitions, including the legendary Tour de France. Outdoor Life is also beginning to test interactive services in conjunction with its original programming and event coverage, including a planned upcoming interactive program to be run with Outdoor Life's coverage of the Tour de France.

E. Speedvision Network

Speedvision launched in January 1996, and currently serves approximately 40 million subscribers. Three quarters of Speedvision's distribution is from carriage by nearly 4,000 cable systems—with almost 90% of such carriage in an analog format. The network offers never-before-viewed programming targeted at boating, aviation and automobile/motorcycle enthusiasts. Speedvision provides magazine and lifestyle programs, historical documentaries, current news and information, and instructional how-to programs. Speedvision also provides coverage of major professional racing events from around the world, spanning the complete spectrum from formula cars to racing yachts. Speedvision is the only network to provide comprehensive, authoritative coverage of the automotive, motorcycle, aviation and marine industries. The network is currently developing plans and testing interactive services that will enhance its programming.

F. The Weather Channel

TWC was launched in 1982, and currently serves more than 78 million homes in the United States. The network's primary source of distribution is through basic cable analog tiers, but it also serves more than 14 million satellite subscribers. TWC provides comprehensive forecasts and weather-related information for more than 77,000 locations around the globe. The network provides special segments throughout the day that feature content highlighting the impact of weather on everyday life. The network also provides seasonal reporting, such as the Annual Fall Foliage Guide, and reports on skiing conditions around the country. Among the vital services provided by TWC, is the channel's coverage of severe weather, such as thunderstorms, and the immediate real-time relay to customized cable equipment at the cable systems across the country of severe weather watches and warnings from the National Weather Service.

TWC also launched Weatherscan LOCAL in 1999. This service is carried on over 100 cable systems and is primarily distributed on digital cable tiers (approximately 60 percent of total distribution) and serves over two million subscribers. Weatherscan LOCAL provides all local weather information, including current conditions, local and regional Doppler Radar, as well as forecasts. This service allows cable operators to customize the service with background theme choices and lifestyle information such as Golf, Boat & Beach, and Skiing Conditions. In November 2000, TWC launched "Instant Weather By The Weather Channel" in cooperation with DirecTV. TWC also offers interactive services, including a "virtual channel," Instant Weather, which provides interactive weather services to 2.4 million DBS subscribers. TWC also distributes a 24-hour Spanish language weather channel, El Canal de Tempo, to DBS subscribers and is currently in negotiations with cable operators to launch the channel on cable systems soon.

III. COMMENTERS ARE THE TYPE OF DIVERSE PROGRAMMING NETWORKS THAT CONGRESS AND THE FCC HAVE SOUGHT TO PROMOTE, AND CONSUMERS WANT TO WATCH

A. Program Diversity Is A Government Interest Of The "Highest Order"

Congress and the Commission have long sought to promote diverse and high quality television programming, and the Supreme Court has recognized the goal of program diversity as a government purpose of the "highest order."[2] One of the primary objectives of Title VI, when first adopted, was to "assure that cable communications provide and are encouraged to provide the widest possible *diversity of information sources and services* to the public."[3] In adopting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), amending Title VI, Congress reiterated its policy objective to "... promote the availability to the public of a *diversity* of views and information through cable television and other video distribution media."[4] In addition, Congress directed the Commission to adopt regulations in order to promote "the public interest . . . by increasing competition and *diversity* in the multichannel video programming market and the continuing development of communications technology."[5]

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[2] *Turner Broad. Sys., Inc. v. United States*, 520 U.S. 180, 117 S. Ct. 1174, 1198 (1997) ("*Turner II*") at 1186.

[3] 47 U.S.C. § 521(4)(emphasis added).

[4] 1992 Cable Act, Section 2(b)(1), 106 Stat at 1463 (emphasis added).

[5] 47 U.S.C. § 548(c)(1) (emphasis added); *see also* § 548(c)(4)(D). In 1996, Congress sought to promote program diversity in its rules governing Open Video Systems. *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, 11 FCC Rcd 20227 (1996), ¶ 224 (citing Conference Report at 172, 177-78). The Commission itself has recognized that the 1992 Cable Act program access-exclusivity restrictions were intended to "promote diversity by providing incentives for cable operators to

Congress and the Commission have expressly acknowledged, and sought to guard against, the potential chilling effect of regulation on the development of new programming services. For example, in adopting the horizontal ownership limitations in Section 633, Congress directed the Commission not to impose "limitations that will impair the development of diverse and high quality programming."[6] Similarly, the Commission has exempted programming networks from certain of the Commission's regulations when program diversity was threatened.[7] Most recently, the Commission modified its Dual Network Rule to eliminate the major network/emerging network merger prohibition, finding that relaxation of the rule would promote diversity in the video marketplace.[8] Today, as much as ever, Congress and the Commission are intent on increasing the diversity of programming choices available to consumers.[9]

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promote and carry a new and untested programming service." *Cablevision Industries Corp. and Sci-Fi Channel*, 10 FCC Rcd 9786 (1995), ¶¶ 27-29.

[6] 47 U.S.C. § 533(f)(2). Although a United States Court of Appeals for the District of Columbia Circuit recently found the FCC's horizontal cable ownership rules to be overreaching, that court expressly recognized the validity of Congress' actions in requiring the rules. *Time Warner Entertainment Co., L.P., v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000). *See also Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, 240 F.3d 1126 (D.C. Cir. 2001).

[7] *See Waiver Of The Commission's Rules Regulating Rates For Cable Services*, 11 FCC Rcd 1179 (1995)("the Commission is guided by the goal of reducing unnecessary burdens on cable operators and providing the cable operators incentives to innovate and promote program diversity in response to competition"); *Sixth Order On Reconsideration (Rate Regulation)*, 10 FCC Rcd 1226 (1994), ¶ 22 (modifying the going-forward rules to ease the burden on establishing new networks). *See also Order On Reconsideration*, Closed Captioning and Video Description of Video Programming -- Implementation of Section 305 of the Telecommunications Act of 1996 -- Video Programming Accessibility, FCC 98-236, MM Docket No. 95-176 (rel. Oct. 2, 1998), ¶ 54 (expanding exemption "to include numerous nascent networks that are continuing to experience growing difficulties").

[8] *In the Matter of Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule, Report and Order*, FCC 01-133, MM Docket No. 00-108 (rel. May 15, 2001) ("*Dual Network Order*"), ¶44.

[9] *See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, 2001 FCC LEXIS 98; 22 Comm. Reg. (P & F) 1414 (rel. January 8, 2001) ("*Seventh Annual Report*").

Given this clearly articulated and consistently applied policy to promote "diversity in ideas and speech,"[10] the Commission should refrain from taking any action that would decrease the diversity of programming choices for the American viewing public.

B. As A Result Of Previous Commission Actions, Diversity Exists In The Marketplace Today And Continues To Grow With The Launch Of Diverse, New Cable Program Networks

Congress' and the Commission's efforts to increase diversity have paid off. The total number cable program networks has grown steadily over the years. For example, there were 281 national satellite-delivered programming networks in 2000,[11] compared to the 172 national satellite-delivered cable programming services reported in the Commission's *Fourth Annual Report*, released in 1998.[12] These networks provide original, high-quality programming covering a broad array of niche subject areas long sought by the viewing public. As a result, Bruce Springsteen's 1992 ballad concerning the dearth of programming options on cable systems, whose refrain retorts "57 channels and nothing on," no longer reflects the reality of the cable television programming marketplace.

Today's cable program networks provide in-depth, 24-hour coverage of a broad array of niche subject areas, including art, music, business, particular sports, nature, history, foreign affairs, ethnic programming, cooking, travel, health, science, religion, and weather, with whole networks being devoted to each of these subject areas. These networks are highly valued by, and uniquely important to, their viewers, whose needs and interests often cannot be satisfied by broadcast programming. By way of example, included among the

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[10] *Time Warner v. FCC*, 240 F.3d at 1130.

[11] *Seventh Annual Report*, ¶ 173.

[12] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034 (1998), ¶ 158.

new multichannel networks launched in the United States last year were Oxygen – a program network targeted to women; National Geographic – a channel focusing on world cultures; and Discovery Health – a network committed to 24-hour coverage of health related issues. [13] Premium services are also expanding their program offerings. For example, in May, 2001, HBO launched its new "HBO/Max Pak", which features seven HBO channels and eight Cinemax channels, including four new Cinemax movie channels geared toward target audiences including women and young adults.[14] Moreover, an additional 66 new networks are planned and scheduled to launch sometime this year.[15] Among some of those planned networks are three new networks aimed at African Americans,[16] "Lifetime Real Women, a program network with reality related programming told from a woman's point of view,[17] and Scripps' "Fine Living Network," described as a "cross between a lifestyle guide and a vacation planner."[18]

As cable network programming improves, and more diverse, quality, networks are distributed on the nation's cable systems, carriage, consumers are demonstrating an intense interest in and appreciation of cable network programming through increased viewing. In May of this year, basic cable networks broke a record and averaged an eight percent rise in primetime to a 25.9 average Nielsen rating, while the broadcast industry declined nine

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[13] Deborah D. McAdams, *Defiantly Analog; New networks vie with phone and data for bandwidth*, BROADCASTING AND CABLE, p. 29, July 3, 2000.

[14] Karen Anderson Prikios, *HBO: Digital to the Max; New channel package increases choice, channels*, BROADCASTING AND CABLE, p. 72, March 19, 2001.

[15] *Seventh Annual Report*, ¶ 176.

[16] Linda Moss and R. Thomas Umstead, *Three More Start-Ups Target Black Audience*, MULTICHANNEL NEWS, p. 38, September 11, 2000.

[17] *Lifetime Launches New 24-Hour Network*, SKYREPORT, April 12, 2001.

[18] Jim McConville, *Solomon To Head Up Fine Living*, ELECTRONIC MEDIA, p. 17, February 12, 2001.

percent from a 33.6 to a 30.5.[19] This trend is expected to continue, with cable beating the networks in ratings during the ensuing summer months.[20] Improved cable ratings offer further proof that viewers are increasingly attracted to the unparalleled quality and diversity of cable programming. As former Chairman Kennard so aptly queried: "*what remains that makes broadcasters so unique as to require cable coverage*?"[21]

The Commission recognized the significant contribution to overall programming diversity provided by cable program networks in its recent decision to relax significantly the broadcast dual network rule. Citing the "growth of cable television networks, direct broadcast satellite services, and the ongoing deployment of digital television," the Commission found that the diversity goals that underpinned enactment of the rule more than twenty years ago already were being satisfied today by a combination of broadcast and non-broadcast programming, and no longer justified the burdensome regulation.[22] The Commission also noted that cable networks contribute substantially to programming diversity by providing programming to viewers from sources other than the six major networks (ABC, CBS, Fox, NBC, UPN and WB).[23]

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[19] R. Thomas Umstead, *TNT Wins May Ratings Race*, MULTICHANNEL NEWS, p. 1, June 4, 2001.

[20] Mike Reynolds, *Basic Cable Takes Summer Jump*, CABLE WORLD, p. 58, September 11, 2000; Joe Schlosser, *The Long (Hot?) Summer; Networks Will Offer Original Programming In What Used To Be The Off-Season*, BROADCASTING AND CABLE, p. 22 June 4, 2001.

[21] Monica Hogan, *Kennard Urges Support For Digital Television*, MULTICHANNEL NEWS, Sept. 21, 1998, p. 66 (emphasis added); *see also* Ted Hearn, *FCC Chief Skeptical Of Must carry*, MULTICHANNEL NEWS, Sept. 28, 1998, p. 8 (quoting Deborah Lathen, chief Cable Services Bureau, "broadcasters have to shoulder the burden of demonstrating that cable operators need to carry their digital-TV signals . . . [N]o one should assume that they have a right to be carried").

[22] *In the Matter of Amendment of Section 73.658(g) of The Commission's Rules – The Dual Network Rule*, Notice of Proposed Rulemaking, FCC 00-213, MM Docket No. 00-108 (rel. June 20, 2000), ¶27; *Dual Network Order*, ¶9.

[23] *Id.*, ¶ 36.

Not only are there more diverse multichannel networks today than in 1998, fewer networks are vertically integrated today, in comparison to 1998. As reported by the Commission, 39 percent of cable networks were vertically integrated in 1998,[24] compared to 34 percent in 2000.[25] The number of non-vertically integrated networks will decrease further when AT&T divests its interests in Liberty Media, as announced at the end of last year and scheduled to occur within the next several months.[26]

Today's diverse program offerings have improved the quality of television viewing substantially by providing a level of depth and coverage previously not offered by broadcast television stations.

C. Commenters Are Examples Of The Fruits Of The Commission's Efforts To Increase Program Diversity

Commenters offer in-depth coverage of diverse, niche subject areas, and provide the breadth of programming options long sought by the American public.

- The Filipino Channel, for example, serves the second largest Asian group in the United States with programming delivered primarily in their native language of Tagalog, a critical feature for the 35.6 percent of U.S. Filipino immigrants who do not speak fluent English.[27] The Channel provides its viewers not just with entertainment, but with news and information that helps

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[24] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284 (1998).

[25] *Seventh Annual Report*, ¶ 172.

[26] *AT&T Announces Plans To Spin Off Liberty Media; Liberty Media to Become Independent Company*, AT&T News Release, November 15, 2000, www.att.com/press/item/0,1354,3482,00.html; *AT&T Receives Tax-Free Ruling From The IRS For Future Split Off Of Liberty Media, AT&T News Release*, April 11, 2001, www.att.com/press/item/0,1354,3745,00.html.

[27] This information is based on 1990 Census Data. While information on the Asian population as a whole has been made available to the public, 2000 Census data on Filipino population statistics has not yet been made available. *See* <http://blue.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

bridge the cultural divide between its viewers' homeland and the United States, their adopted home.

- INSP provides exclusive and original value-based programming produced by over 80 different religious organizations, including 23 minority organizations, representing over 20 different denominations. According to research conducted by INSP, 84% of all Americans go to religious service every month, and more than five times as many people attend religious service weekly as go to all movies combined. INSP provides religious and value based programming to this population group on a full time basis, seven days a week, not just the occasional program on Sunday mornings as seen on most broadcast television stations.

- The Golf Channel provides in-depth coverage of a sport fast becoming an American past-time, with approximately 35 million Americans playing golf yearly. The network provides not only coverage of major national and local golf tournaments, but also educational programs for both the experienced golfer and the nearly three million people who take up the sport each year. Its programming is available to golf enthusiasts not just on weekend afternoons, as on broadcast television, but on a 24 x 7 basis.

- Outdoor Life is the leading source for television coverage of expeditions and adventure, wildlife and environmental issues, alpine sports, hunting and fishing, cycling, water sports and more. The network's extensive coverage of events like the Tour de France provides its viewers not just with far more programming of these genres than can be found on broadcast television, but with a much greater depth of coverage of the challenges and triumphs of explorers and environmentalists, and athletes such as Lance Armstrong, who are featured in the network's telecasts.

- Speedvision provides its audience of racing fans with complete coverage of major professional racing events from around the world. American consumers spend a staggering $700 billion a year on cars, trucks and after-market parts. As the only network dedicated to the passions of these consumers, Speedvision serves as a major entertainment and information resource for this growing segment of the population.

- The Weather Channel provides not only its original channel containing national weather programming and forecasts, but now also provides 24-hour local coverage through Weatherscan LOCAL. Each service provides forecasting, as well as seasonal weather programs and reports, that provide viewers with a degree of coverage of local and national weather conditions – particularly, of emerging conditions that may pose a threat to safety – that far exceeds the weather coverage available from broadcast television stations.

Commenters are just a subset, however, of the more than 280 existing cable networks, and 65 planned networks, that are targeted to an incredibly broad range of interests and population groups. Together, these networks represent the diversity sought by Congress, and serve millions of Americans across the country that would otherwise be underserved, or unserved, by broadcast television.

IV. CHANNEL CAPACITY FOR VIDEO SERVICES IS STILL LIMITED, DESPITE CABLE UPGRADES

Today's diverse programming networks still must compete vigorously for carriage, notwithstanding cable upgrades.[28] Even many established networks must offer a combination of perks to secure carriage, including low rates, free service periods, and launch support. While overall channel capacity on cable systems is increasing, the

[28] Linda Moss and R. Thomas Umstead, *Three More Start-Ups Target Black Audience*, MULTICHANNEL NEWS, p. 38, September 11, 2000.

amount of channel capacity available to program networks is still scarce. Much of the new "space" created by cable upgrades is allocated for services other than traditional video programming, and for backlogged programming deals. And, as recognized by the Commission in the FNPRM, other government imposed access obligations further reduce the amount of channel space available to cable program networks.

A. Cable Companies Are Upgrading Their Systems To Provide Various Other Valuable Services That Will Compete With Cable Program Networks For Shelf Space

Many cable operators are utilizing newly acquired bandwidth to offer valuable services other than traditional video programming, such as high-speed Internet service, interactive and other enhanced services, and cable telephony – services that require a substantial amount of system bandwidth.[29] For example, more than four million homes and small businesses throughout the country connect to the Internet through cable's broadband (or high-speed) lines.[30] In addition, many cable operators are pursuing video-on-demand ("VOD," including "subscription video-on-demand"), another bandwidth

[29] *Seventh Annual Report*, ¶¶ 14, 40, 55-59 ("Cable operators continue to upgrade their networks at a rapid pace in order to add new service offerings. This year the industry began to see the commercial deployment of such new service offerings as video-on-demand and increased trials of telephony over cable systems."); *see also Cable Television Industry Overview 2000: Delivering New Products & Services*, <http://ncta.cyberserv.com/qs/user_pages/newps.cfm> ("In addition to digital television programming, these new services include high speed internet access, interactive and enhanced television services, as well as telephony."); Mike Farrell, AT*&T Story Stirs Tempest Over Hikes*, MULTICHANNEL NEWS, p. 1, April 17, 2000 (Many of the former TCI systems needed upgrading from 330 MHz to 860 MHz "in order to accommodate AT&T Broadband priorities [such] as telephony, high-speed-data carriage and digital video."); John M. Higgins, *Grading the MSOs; Morgan Stanley financial analysis of the eight largest cable operators puts Comcast on top*, BROADCASTING AND CABLE, p. 42, November 27, 2000 (AT&T Broadband Chairman Dan Somers is looking toward the completion of AT&T's expensive system upgrades because it will allow "greater deployment of new interactive, data, and telephone products, all of which promise to generate high margins."); Michael S. Willner, CEO, Insight Communications, *Remarks before the Senate Commerce Committee On the Digital Transition*, March 1, 2001 <http://www.ncta.com/legislative/testimony.cfm?PRid=103&showArticles=ok > (The upgrades have led to "scores of new channels, interactive community news and information platforms, video-on-demand services, high speed access and facilities-based telephone service.").

[30] <http://www.ncta.com/broadband/broadband.cfm?broadID=4>

intensive service that allows customers to watch new movie releases or TV programs, with real-time control of such features as pause, fast-forward, and rewind.[31] VOD is just part of "Interactive Television," a service that some predict will change the way Americans watch TV forever.[32] Cable is also beginning to offer facilities-based competition to local telephone companies by providing enhanced services, including voice mail, caller ID, and call forwarding.[33] In cable systems that are being upgraded from 400-450 MHz (topping out at 60 to 75 channels) to 750-860 MHz of capacity, much of the capacity above 550 MHz is being dedicated to these other services.[34]

All of these new services require substantial amounts of bandwidth that previously was allocated strictly for video services. Some of the Commenters offer or plan to offer interactive services now or in the future, and know first hand that such services, while highly desirable, consume significant bandwidth. For example, TWC has had difficulty securing carriage for its virtual channel due in large part to the sizeable amount of bandwidth required to carry such interactive services. Because of current capacity restraints, DirecTV and cable operators have refused to carry the service in its

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[31] Testimony of Robert Sachs, President & CEO, National Cable Television Association, *Cable and Video: Competitive Choices*, before the Subcommittee on Antitrust, Business Rights, and Competition Committee on the Judiciary, United States Senate, Washington, D.C., <http://www.ncta.com/legislative/testimony.cfm?PRid=110&showArticles=ok>, April 4, 2001 ("Sachs Testimony").

[32] David Ward, *Experts Say Interactive TV Profits Still Are Years Away*, COMMUNICATIONS DAILY, Today's News, March 1, 2001; Monica Hogan, *ITVers Say Business Models Will Come*, MULTICHANNEL NEWS, Feb. 5, 2001 <http://www.tvinsite.com/multichannelnews...ews&doc_id=&articleID=CA62081&pub_id=MCN>; Diane Mermigas, *The Very Big Engine That Could; AOL TW Seeks Synergy, Savings and Massive Corporate Muscle*, CRAIN COMMUNICATIONS INC., January 22, 2001, p. 1.

[33] AT&T Broadband, Cox Cable, and Cablevision are offering such services today. Sachs Testimony.

[34] Deborah D. McAdams, *Defiantly Analog; New networks vie with phone and data for bandwidth*, BROADCASTING AND CABLE, p. 29, July 3, 2000. *See also* Carl Weinschenk, *PERFORMANCE PRESSURE – Success demands that cable operators upgrade to meet customer expectations*, TELE.COM, May 1, 2000.

intended format, requiring TWC to scale back the number of cities offered on the service, and to not offer a radar feature. Commenters Outdoor Life and Speedvision have also been testing interactive services, and can further attest to the increased bandwidth required by such services.

New networks such as i-Lifetv especially have felt the competition from new services for extant channel capacity. Cable operators are not "opening up the floodgates to new networks. . . . [They] face a tough fight to break through the clutter, a matter that's compounded by operators' scattered focus as they add other new services, such as high-speed data and telephony."[35] Even established networks seeking to launch new networks are not immune to the channel capacity challenge. In responding to questions about why Fox cancelled its Boyz and Girlz networks, Tracy Lawrence, Fox Family general manager, stated, "[a] number of operators have delayed their rollouts, and they are becoming more hesitant to commit to concrete distribution numbers."[36]

B. An Increased Number Of Video Programming Services Are Vying For Extant Channel Capacity

The number of non-broadcast programming networks has more than doubled since Congress adopted the must carry requirements in October 1992. The Commission itself has recognized that the programming supply market is extremely competitive notwithstanding "increases in cable channel capacity, with the growth rate of new

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[35] Monica Hogan, *Emerging Networks Face Fight for Carriage*, MULTICHANNEL NEWS, p. 80, July 10, 2000.

[36] Linda Moss, *Digi-Net Duo Bites Dust; Fox Family to Pull Boyz, Girlz Nets*, MULTICHANNEL NEWS, p. 1, August 14, 2000.

programmers rapidly outpacing the growth of new channels."[37] Operators are devoting more channel space to pay-per-view channels.[38] In May, 2001, HBO launched its new "HBO/Max Pak", which features seven HBO channels and eight Cinemax channels, including four new Cinemax movie channels geared toward target audiences including women and young adults.[39] Moreover, it is estimated that going forward, the average cable operator will add just three new basic programming networks a year,[40] and many of these additions will be the result of backlogged programming deals, and not new agreements entered into with programming networks.[41]

Digital channel space, once considered the answer to capacity problems, is also scarce. Program networks, like Commenters, are finding that less than one-third of the new digital video capacity is being devoted to networks such as theirs. Instead, premium services, pay-per-view services and other pay services are garnering anywhere from 70 to 80 percent of any added capacity.[42] Digital networks, such as INSP's i-Lifetv, are having

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[37] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order ("*Horizontal Ownership Order*"), 14 FCC Rcd 19098 at 19104 (October 8, 1999).

[38] R. Thomas Umstead, *Op's Digital Push Squeezes Analog PPV*, Multichannel News, p. 32, March 26, 2001; *Boston Cable TV Company Looks to Expand Into Rhode Island*, Providence Journal-Bulletin, June 7, 2000.

[39] Karen Anderson Prikios, *HBO: Digital to the Max; New channel package increases choice, channels*, Broadcasting and Cable, p. 72, March 19, 2001.

[40] Monica Hogan, *Emerging Networks Face Fight for Carriage*, Multichannel News, p. 80, July 10, 2000. See also Sachs Testimony.

[41] Deborah D. McAdams, *Defiantly Analog; New networks vie with phone and data for bandwidth*, Broadcasting and Cable, p. 29, July 3, 2000.

[42] For example, more than 80 percent of the digital video offered by Comcast Cable of Arlington/Alexandria, VA are pay services, including pay-per-view channels, premium services, and pay-sports services. < http://www.comcast.com/cablesys/defaultframe.asp>. Similarly, 75 percent of Time Warner New York's digital capacity is devoted to pay and premium services, <http://www.twcnyc.com/dtv/whatson.html>, while approximately 70 percent of Cox's Palos Verdes'

trouble securing carriage from cable operators that are asserting that even digital slots are unavailable. TWC also has had difficulty securing digital carriage for its Spanish language channel because of limited space on operators' digital tiers devoted to Spanish language services.

C. Other Regulatory Access Requirements Limit The Amount Of Extant Channel Capacity On Cable Systems

All cable systems, whether upgraded or not, must set aside a certain percentage of their channel capacity for government-imposed access requirements, including must carry, commercial leased access, and public, educational and government access.[43] The Commission recognizes the potential drain on capacity from regulatory requirements in the FNPRM, where it asks about the average number of channels dedicated to such programming.[44] In their Original Comments, commenters Golf, Outdoor Life and Speedvision submitted a hypothetical representation of an average cable system with 44 channels, 15 of which (33 percent) were allocated to analog broadcast stations that qualify for must carry; 3 of which channels were set-aside for commercial leased access (10 percent of non-must carry channels); and 3 of which were dedicated to public, educational and governmental ("PEG") access programs. As demonstrated there, after satisfying its regulatory requirements, the cable system had only 23 channels on which to carry over 250

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digital capacity is devoted to those services. <http://www.cox.com/PV/digitalv/Digital%20Channel%20Listings.asp>.

[43] *Broadcast Signal Carriage Issues*, Report and Order, FCC 93-1448 FCC Rcd 2965 (1993); *Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, FCC 94-211, 9 FCC Rcd 6723 (1994); *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, Second Report and Order and Second Order on Reconsideration of the First Report and Order, FCC 97-27, 12 FCC Rcd 5267 (1997); 47 U.S.C. §531.

[44] FNPRM at ¶ 123.

then existing multichannel networks.[45] An updated, 2001-version of this analysis would yield similar results, as the Commission recently confirmed that the percentage of cable systems offering 30-53 channels of programming (63.8%) has remained virtually unchanged since 1996, even with 75 percent of cable system upgrades now complete.[46]

Even in today's upgraded systems, the amount of analog channel space available to multichannel networks is limited. For example, a 750 MHz system has approximately 700 MHz or 116 Six MHz slots available for downstream content.[47] Typically, the operator devotes 200 MHz or 33 Six MHz channels to digital services, including VOD and music programming.[48] The remaining 80 or so slots are dedicated to the operator's analog video line-up.[49] Of the analog channels, up to 38 channels (33% of 116) could be occupied by broadcast stations that qualify for must carry;[50] 18 channels must be set-aside for commercial leased access (15 percent of 116 channels);[51] and an average of 6 channels

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[45] Original Comments of Golf, OLN and Speedvision at 19.

[46] *Dual Network Order* at 11 (the percentage of cable systems offering 30-53 channels of programming (63.8%) remained virtually unchanged since 1996, and 86.6% of systems offered 30 or more channels in 2000). *Seventh Annual Report*, Table B-3 (reporting 62.37% of cable systems to be at 30-53 channels as of October 2000).

[47] Fifty MHz typically is reserved for upstream, including Internet service.

[48] Testimony of Michael Willner, President, Insight Communications, *Digital Television: A Private Sector Perspective On The Transition*, before the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee, March 15, 2001.

[49] An example of this is Comcast Cable of Arlington/Alexandria, Virginia.

[50] 47 C.F.R. § 76.56(b)(2)— The Digital Must Carry Order changes calculation from a 6MHz channel calculation to a total system capacity (based on MHz) calculation. *Carriage of Digital Television Broadcast Signals*, First Report and Order, FCC 01-22, CS Docket No. 98-120 (rel. Jan. 23, 2001) ("Digital Must Carry Order"), ¶¶ 40-41.

[51] 47 U.S.C. § 532(b)(1)(A).

typically would be required for public, educational and governmental access programs.[52] The end result could yield 281 program networks competing for carriage on a system with fewer than 18 available analog channels.

While the Commission asks for this information in the FNPRM, it recently assembled some of this information in its report concerning cable rates. Answers to the Commission's survey in that proceeding showed the average number of broadcast and satellite channels on BST and CPST service during the 12 months ending July 1, 2000, for competitive systems to be 59.9 channels and for non-competitive systems to be 54.8 channels.[53] The satellite-only numbers for the same time period were 44.4 channels for competitive systems and 40.5 for non-competitive systems.[54] For both competitive and non-competitive systems, the average number of channels devoted to non-satellite programming – including broadcast channels, PEG programming and local origination – calculates to approximately 15 channels, or 25%. In addition, according to the report, the large majority (82%) of all cable operators are using at least one channel for commercial leased access programming, and more than half are using an average of 1.8 channels each for leased

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[52] The number of PEG channels required by local franchising authorities has increased dramatically in recent years. *See, e.g., City Paves Way For New Broadband System*, BUSINESS DATELINE, Vol. 18, No. 39; p. 12 (Sept. 25, 2000) (City of Grand Rapids requires up to 7 out of 80 channels be set aside for PEG access); Jennifer Files, *AT&T Lawsuit Could Delay Cable Service in San Jose, Calif.*, SAN JOSE MERCURY NEWS (Aug. 22, 2000) (San Jose seeking to increase number of PEG channels from 2 to 7); Steve Alexander, *Paragon Cable To Offer Faster Internet Access; Plan Marks Change In Direction In Dispute With Minneapolis*, STAR TRIBUNE, p. 1A (October 5, 1999) (while Minneapolis requires 30 channels be set aside for PEG, most cities require four to eight); Jeanette Steele, *Cable Commission Airs Proposal For More Channels*, THE COLUMBIAN (Vancouver, WA), Section B, p. B (Sept. 18, 1997) (City of Vancouver Washington requiring cable operator to set aside 9 channels for PEG access on a 550 MHz system).

[53] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 – Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, FCC 01-49 (rel. Feb. 14, 2001) at Table 5, ¶ 170, and Table 6, ¶229.

[54] *Id.* at Table 5, ¶ 180, and Table 6, ¶239.

access programming.[55] Thus, based on the average numbers reported by the FCC, today's more than 280 satellite networks compete for barely 40 analog slots on each cable system. If the Commission were to impose a dual carriage requirement, the number of broadcaster allocated channels could double and most cable operators would have to devote 33% of their channels to broadcast signals, leaving fewer than 35 channels for 281 satellite programmers, PEG obligations and leased access.

In sum, no matter what numbers are used, the regulatory requirements already consume valuable channel space coveted by non-broadcast networks, and any further reduction in channel capacity would only mean fewer channels available for diverse niche networks like Commenters.

V. LOSS OF CARRIAGE OR LOSS OF VIEWERS—EVEN FOR A SHORTENED TIME PERIOD—WOULD RESULT IN THE LOSS OF PROGRAMMING NETWORKS AND WOULD REDUCE PROGRAM DIVERSITY IN THE VIDEO MARKETPLACE

Adoption of a dual carriage requirement indisputably would reduce the amount of extant channel capacity on cable systems and, thus, stunt the development of some networks, cause others to fail, and make it impossible for many planned networks to launch. Moreover, quality networks such as Commenters would be displaced by duplicative broadcast signals, reducing the diversity of programming currently available to subscribers. Seemingly recognizing the certainty of this outcome, the FNPRM questions whether the impact of a dual carriage requirement could be ameliorated either by shortening the duration of such a requirement or by resorting to an alternative plan under which program networks would be shifted from existing analog carriage to digital tiers. These supposed "compromises" would, however, provide no meaningful relief to

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[55] *Id.* ¶447.

program networks from the impact of digital must carry and should, therefore, be rejected.

A. Imposition Of A Dual Carriage Requirement Would Reduce Extant Channel Capacity, Harm Cable Program Networks, And Ultimately, Diminish Diversity

There is no question that a dual carriage requirement would require cable operators to devote a greater number of analog channels on their basic tier to carriage of broadcasters' digital signals and, thus, reduce the number of analog channels available to cable operators for other uses. While Commenters cannot predict with precision the extent to which cable operators would bump existing networks, it is clear that many systems would indeed be forced to jettison cable networks or shift them to less penetrated digital tiers. The Commission itself recognized this possibility in the FNPRM, stating "there is a risk that if carriage were mandated, cable subscribers would lose existing cable programming services that would be replaced on the channel line-up by digital television signals with less programming."[56]

In fact, program networks already find it difficult to obtain and maintain carriage in today's video marketplace under a single-signal must carry requirement. INSP, for example, recently was dropped by a cable system as a result of the current must carry rules, after a broadcast station asserted its mandatory carriage rights in the Bluefield, Tennessee market. A dual carriage requirement would exacerbate this problem, as less established niche services like some of the Commenters would be among the first networks to be dropped. And, while several established programming companies, such as Discovery Communications and Scripps, have been able to launch additional new

[56] FNPRM at ¶ 120.

networks that complement their more established networks, these networks gained footholds in the past, in part, due to name recognition and reputation. [57] Indeed, in the changed cable marketplace, not even the Discovery name could save "Discovery People," which went dark as a result of carriage issues.[58]

Any additional regulations that force cable operators to set aside additional channel capacity for broadcast networks surely will have a direct and negative effect on the level of diversity in the video programming market. If even a few channels on cable systems serving major markets were required to be devoted to duplicative digital broadcast signals, rather than to their current carriage of cable program networks, the resulting loss in distribution would be enough to push some networks below the point of viability, depriving subscribers in those systems and across the country of those additional voices.

Other networks could survive but any reduction in distribution would force them to slash programming budgets and possibly forego the acquisition and/or production of original, high quality programming. The costs of launching, and sustaining the operation

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[57] Scripps, for example, launched the Do-It-Yourself network after Home & Garden Television gained popularity. Discovery Communications launched Animal Planet and The Learning Channel, both of which complement The Discovery Channel's programming. *See* Jim McConville, *HGTV Plot Thickens; Renovated '00-'01 Slate To Spotlight Narrative-Driven Lifestyle Shows*, ELECTRONIC MEDIA, p. 8, April 10, 2000; Lee Hall, *The Digital Ad-Age: Good Things Come . . .Digital Networks Not Concerned About Profits – Yet*, ELECTRONIC MEDIA, p. 18, April 5, 1999; Lee Hall, *HGTV Blooming Into Profit Maker*, ELECTRONIC MEDIA, p. 41, May 18, 1998; Jim McConville, *Cable's Big Season: Animal Planet Exec A Proud Papa Now*, ELECTRONIC MEDIA, p. 12, August 25, 1997; Jim McConville, *Hendricks Details Big Digital Game Plan: Discovery Plans To Launch Four More Channels*, ELECTRONIC MEDIA, p. 1, September 15, 1997.

[58] Monica Hogan, *Emerging Networks Face Fight for Carriage*, MULTICHANNEL NEWS, p. 80, July 10, 2000.

of, a profitable, quality program network are enormous, and continue to rise.[59] The costs of producing and acquiring original, quality programming alone are substantial.[60] Recent years have seen program networks increase their reliance on original programming in order to differentiate themselves from other networks, or simply because "niche nets often can't find programming that fits their niche."[61] But whatever the reason, program networks are paying "top dollar" for programming, whether acquired or created.[62]

In order to cover these costs, basic cable networks depend primarily on two revenue sources: affiliation fees and advertising revenues — both of which are directly linked to subscriber distribution. Pay services, whose revenue streams are comprised of advertising and a percentage of the subscription fee, are also dependent on eyeballs. In other words, the viability of any programming network is directly dependent upon the extent of its carriage. The Commission has recognized that a new basic cable network generally will not be viable without a minimum of at least 15 million subscribers, that it generally will not break even until its distribution reaches at least 20 million subscribers, and that some networks may need even more subscribers to be successful.[63] While these numbers change somewhat for pay services and non-profits, any reduction in subscriber distribution for these networks would result in reduced programming productions and/or

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[59] Jean Bergantini Grillo, *What's Up With Originals?; For One Thing, Costs, As Networks Battle In A More Competitive Market*, BROADCASTING AND CABLE, p. 18, May 28, 2001. *See also Seventh Annual Report*, ¶¶ 24-25; Sachs Testimony.

[60] Ed Kirchdoerffer, *Digital Play In The U.S. of A.*, Realscreen, April 1, 1999.

[61] Jean Bergantini Grillo, *What's Up With Originals?; For One Thing, Costs, As Networks Battle In A More Competitive Market*, BROADCASTING AND CABLE, p. 18, May 28, 2001.

[62] *Id.*

[63] *Horizontal Ownership Order*, 14 FCC Rcd at 19115.

staff layoffs to pare expenses to projected revenue levels, and could result in termination of the networks.

Not only would some networks fail and others be forced to cut back on programming, if a dual carriage requirement were imposed and channel capacity further limited, but plans to launch new networks would be put on hold, if not cancelled altogether. In fact, already fewer new networks are launching today than have in past years. The Commission recently recognized that sparse analog channel capacity might account for the slow-down in the launch of new programming networks.[64] Any additional reduction in channel capacity would further stunt the development of new networks.

The loss of this diverse programming would be compounded by the fact that the services by which cable program networks would be replaced—i.e., the new digital broadcast signals—would be largely, if not wholly, duplicative.[65] As the Commission recognized in the FNPRM, "there appears to be a limited amount of original digital programming being broadcast," and thus, "cable subscribers would not *immediately* benefit from a dual carriage rule if there is little to view but duplicative material."[66] In fact, cable subscribers would *never* benefit from a dual carriage requirement because in less than two years from today, broadcasters are required to begin duplicating

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[64] *Seventh Annual Report*, ¶ 176.

[65] Digital Must Carry Order at ¶ 9 ("Toward the end of the transition period, there would be an increasing redundancy of basic content between the analog and digital signals as the Commission's simulcasting requirements are phased in. We recognized that, to the extent that the Commission imposes a dual carriage requirement, cable operators could be required to carry double the amount of television signals, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited.")

[66] FNPRM at ¶120 (emphasis added).

programming on their analog and digital signals.[67] Thus, a dual carriage requirement would seriously jeopardize the present diversity in cable channel lineups by giving preferential carriage to duplicative broadcast signals, and effectively reducing the viewing options available to subscribers.

B. The Proposed Truncated Transition Schedule Would Still Harm Programming Networks

The Commission asks in the FNPRM whether the dual carriage burden may be lessened by using a transitional approach limiting dual carriage to a specified period of time, such as three years.[68] This supposed compromise is illusory, however, as even a truncated schedule would harm program networks, and thus it is not an acceptable alternative.

Displacement during even a three-year period would foreclose carriage for many networks. While that foreclosure might end after three years, instead of six, under this compromise proposal, far too many networks that lost carriage during the three year period would have gone dark, and promising network concepts whose launch was anticipated would have been irretrievably lost. Thus, the fact that the dual carriage requirement would be shortened from six to three years would do little to avoid the network carnage that would be sure to result from a dual carriage requirement.

Moreover, some networks have been placed on waiting lists, in which they have been promised carriage as capacity becomes available. Any reduction in extant channel capacity brought about by a dual carriage requirement, even for a truncated period, could extend these waiting lists and further delay the networks' carriage on these systems.

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[67] FNPRM at ¶68.

[68] FNPRM at ¶ 118.

C. Shifting Programming Networks From An Analog Tier To A Digital Tier Would Drastically Reduce Programming Network Revenues And Could Cause Irreparable Harm

The Commission also requested information concerning new "techniques" that conserve or recapture cable channel capacity, including "shift[ing] certain services from an analog tier to a digital tier."[69] Commenters oppose any solution that would require operators to shift their programming from highly-coveted analog spots, often obtained through protracted and skillful negotiation, to digital tiers. The average penetration for digital tiers is substantially less than analog tiers – digital tier penetration is currently at 10 million subscribers nationwide – and thus, hardly enough to sustain the profitable operation of most basic cable program networks.[70] The Commission recently recognized that "the more limited exposure [program networks] receive by virtue of their placement on digital or other tiers to which subscribership is restricted and the associated difficulties of attracting an audience base to support advertising sales" diminish the benefits of increased channel capacity.[71] As demonstrated above and acknowledged by the Commission, most program networks need at least 20 million subscribers to reach break even.

Some cable networks may be willing to negotiate digital carriage as part of a larger deal in which other benefits are provided to the network, but typically steer away from deals offering only digital carriage. For example, in order to temporarily expand channel lineups at its smaller systems, Adelphia Communications Corp. is reported to have proposed to "shift" a group of programming services from their current analog slots

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[69] FNPRM at ¶ 126.

[70] <http://www.ncta.com/broadband/broadband.cfm?broadID=2>.

to Adelphia's digital tier.[72] But that isn't the whole story. As reported, part of those negotiations included additional launches for participating networks on other systems with fewer capacity restraints.[73] While arrangements such as these may in some instances be appropriate marketplace solutions to capacity constraints, they are neither appropriate nor sufficient as a regulatory justification of a dual carriage requirement.

Moreover, while most programmers need analog carriage to survive, even those who would opt for digital carriage are finding carriage commitments hard to come by.[74] Digital-cable platforms have "rolled out more slowly than expected," and become "a lot more crowded" during the past two years.[75] As explained above, cable operators are using digital channels primarily for premium services, and pay-per-view, including VOD and sports programming, and only a limited number of slots are being set aside for niche programming services.[76]

Cable program networks simply cannot withstand the inevitable reduction in subscriber penetration that would occur from forced relocation of their programming to

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[71] *Horizontal Ownership Order*, 14 FCC Rcd 19098 at ¶14.

[72] Linda Moss, *Adelphia Rebuild Plan Needs Help from Nets*, MULTICHANNEL NEWS, October 2, 2000, p. 1.

[73] *Id.*

[74] Linda Moss, *Digi-Net Duo Bites Dust; Fox Family to Pull Boyz, Girlz Nets*, MULTICHANNEL NEWS, p. 1, August 14, 2000.

[75] *Id.*

[76] See note 37, supra. *See also*, Ed Kirchdoerffer, *Digital Play in the U.S. of A.*, REALSCREEN, DIGITAL CABLE, April 1, 1999 ("cable systems will likely use the extra chanel capacity for pay-per-view services rather than special interest channels. . . .MSOs like Comcast and MediaOne are not ofering basic services in their initial digital rollouts."); *PVRs Scrambling to Offer VOD TV Services; Brief Article*, VIDEO AGE INTERNATIONAL, p. 51, October 1, 2000 ("[Cable operators] need to have 20 channels reserved for . . . video-on-demand use."); Jeff Richgels, *Charter Changes Aimed At Customers*, THE CAPITAL TIMES, (MADISON, WI), February 21, 2001 ("Charter also will complete moving all of its premium channels – HBO, Cinemax, Showtime, etc. – to digital cable.).

digital tiers. Networks have fought to retain analog carriage in the past and should not be relocated merely so that broadcasters can have two prime analog slots for what will eventually be two redundant broadcast signals.

D. Broadcasters Should Not Receive Additional Preferential Treatment From Imposition Of A Dual Carriage Requirement

"Congress was advised the viability of a broadcast station depends to a material extent on its ability to secure carriage."[77] As demonstrated above, and recognized by the Commission, this statement is also true for programming networks. Broadcasters' carriage is already secured by the existing must carry rules. Cable programmers, while advancing the government's interest in diversity, must compete for carriage, unassisted by the government. While program networks such as Commenters struggle to secure carriage on cable systems for their traditional and interactive services, broadcast networks argue that they are entitled to preferential rights to this bandwidth for their duplicative telecasts, interactive services and multiplexed programming.[78]

Broadcasters argue that without the additional help of a dual carriage requirement they will be unable to make the digital transition, much less sustain operations.[79] In truth however, broadcasters are already gaining carriage of digital signals through retransmission consent agreements, as evidenced by Time Warner's agreement with

[77] *Turner II* at 1195.

[78] *Seventh Annual Report*, ¶ 102 ("Possible new broadcasting services using DTV include HDTV, multicasting, combining frequencies to provide packages of services, and interactive services such as delivering Internet content to computers. We previously reported on Geocast's plans to use Hearst-Argyle DTV spectrum to deliver Internet content to computers. In addition, broadcasters have formed two additional consortia to combine DTV spectrum to allow third parties to deliver services to consumers, including content delivery to televisions and computers.").

[79] Steve Donohue, *Digital Works in Raleigh*, MULTICHANNEL NEWS, SPECIAL SUPPLEMENT, p. 6A, April 23, 2001. *See also*, National Association of Broadcasters, Petition for Reconsideration, CS Docket No. 98-120, filed April 25, 2001.

WRAL-TV Raleigh, the local CBS affiliate, as well as Time Warner's agreement with PBS.[80] Time Warner has also entered into agreements with Fox and NBC, in addition to several broadcast stations in Texas,[81] while AT&T has established voluntary retransmission consent agreements with NBC and Fox owned and operated stations.[82] It has also been reported that a significant number of other cable operators have entered into voluntary retransmission negotiations, using Time Warner's agreements as models.[83]

The fact of the matter is that broadcasters, through their existing must carry rights, already have preferred status. Moreover, they have shown their ability to gain carriage of their digital and multiplexed signals without need for additional preference. Counter posed, cable program networks are already fighting for carriage in the marketplace. The Commission should not further prejudice cable networks, and reduce the diversity of programming available to viewers, by adopting a dual carriage requirement.

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[80] Steve Donohue, *Digital Works in Raleigh*, MULTICHANNEL NEWS, SPECIAL SUPPLEMENT, p. 6A, April 23, 2001.

[81] Jon LaFayette, *Fox gets cable deal; Time Warner, ABC still negotiating for retransmission*, ELECTRONIC MEDIA, p. 1, January 3, 2000; *What Gatekeeper: Time Warner Cable Reaches Retrans Deal with NBC*, CABLEFAX, Vol. 11, No. 98, May 18, 2000; Linda Moss, *Time Warner, Belo Will Make News*, MULTICHANNEL NEWS, PROGRAMMING, p. 32, October 2, 2000.

[82] *NBC And AT&T Broadband & Internet Services Enter Into Long-Term Agreement On The Analog And Digital Future Of NBC Program Services; Eight Year Agreement Insures AT&T Customers Will Get NBC; NBC's Cable Services CNBC, MSNBC; NBC's Digital Offerings, As Well As The Next Five Olympic Games On Cable And Broadcast*," PR NEWSWIRE, FINANCIAL NEWS SECTION, June 10, 1999; *AT&T Broadband & Internet Services and Fox Entertainment Group Enter Into Long-Term Retransmission and Digital Agreement For Fox Owned-And-Operated Stations*, CAMBRIDGE TELECOM REPORT, September 13, 1999.

[83] *PTV Stations, Cable Operators Pursue DTV Carriage Deals*, COMMUNICATIONS DAILY, TODAY'S NEWS April 19, 2001.

VI. A DUAL CARRIAGE REQUIREMENT CANNOT WITHSTAND THE REQUIRED CONSTITUTIONAL ANALYSIS UNDER *TURNER* AND *O'BRIEN*

In its First Report and Order, the Commission stated, "we tentatively conclude that, based on the existing record evidence, a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests of preserving the benefits of free over-the-air local broadcast television; promoting the widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming."[84] This conclusion is absolutely correct and was recently echoed by Representative Upton, House Telecom Subcommittee Chairman, in an address to the Federal Communications Bar Association.[85] Not only will such a requirement burden cable operators' First Amendment interests, but, as shown above, it will also unfairly jeopardize the existence of non-broadcast networks of Commenters.

There can be no doubt that the existing mandatory carriage requirements infringe on the protected speech rights of both program networks and cable operators.[86] Yet, the courts upheld this infringement, by the narrowest of margins, because it was the least restrictive way to further three important governmental interests: (1) the preservation of the benefits of free, over-the-air broadcast television; (2) the promotion of widespread dissemination of information from multiplicity of sources; and (3) the promotion of fair competition in the television programming market. *Turner II*, 117 S. Ct. at 1181, 1186.

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[84] Digital Must Carry Order at ¶ 3.

[85] COMMUNICATIONS DAILY, Mass Media Section, Vol. 21, No. 93, May 14, 2001 ("Any congressional dual must carry mandate imposed on cable for DTV transition likely would be rejected by courts.").

[86] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) ("*Turner I*"), and *Turner II*, 580 U.S. 180, 117 S. Ct. 1174, 1198.

A dual carriage requirement would only increase the intrusion on cable operators' and cable programmers' speech rights, and would not serve to further *any* of the stated interests in *Turner*. In fact, as shown above, a dual carriage requirement of any duration would instead decrease the dissemination of information from a multiplicity of sources, and harm competition by giving broadcasters an unfair advantage over cable networks. In addition, such a requirement would do nothing to further assure the preservation of free, over-the-air broadcast television, as the overwhelming majority of viewers cannot receive digital broadcast signals for free, over the air.

In balancing the burden of the original must carry mandate, the Supreme Court relied on the fact that "the burdens of must carry will soon diminish as cable channel capacity increases."[87] As shown above, however, that prediction has not materialized, and if anything, the fight for carriage of new program networks has increased over the last several years, with channel capacity not keeping pace with the proliferation of new program networks and other cable services.

The Commission has also found that, "[b]ased on the record currently before us, we believe that the statute neither compels dual carriage, nor prohibits it."[88] However, as previously argued by many of the Commenters in their original comments in this proceeding, Section 624(f) of the Communications Act provides that "[a]ny Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title." 47 U.S.C. § 544(f)(1). In other words, Section 624(f) prohibits the Commission from enacting digital must carry

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[87] *Turner II*, 117 S.Ct. at 1198.

[88] FNPRM at ¶ 113; *see also*, Digital Must Carry Order at ¶¶ 2, 13.

requirements during the transition period absent an *express* authority from Congress in Title VI. None exists. Congress specifically limited the Commission's Section 614 authority to broadcasters' signals that "have been changed" to the new advanced format.[89]

At a minimum, given this lack of express statutory authority, the Commission must exercise extreme caution before adopting regulations that burden speech. The recent *Time Warner* case illustrates the heightened scrutiny exercised by courts in this area, stating that "[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable."[90] In that case, the Court concluded that the Commission had burdened speech more than was necessary in imposing vertical and horizontal ownership limitations on cable operators.[91]

In this case, a dual carriage requirement is not tailored to achieve the government's interests identified in the first challenge to must carry: programming diversity would actually suffer, and the rules would not preserve free over-the-air television. Nor would a dual carriage requirement further the government's interest in transitioning from analog television services to digital. As recognized by the Commission, "[s]ome of the biggest challenges [to a successful transition], such as increasing the production of digital content, copy protection, and consumer purchase of DTV equipment, are largely outside the Commission's control."[92] A dual carriage requirement would burden substantially more speech than is necessary and, thus, would not withstand constitutional scrutiny.

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[89] *See* Original Comments of Golf, OLN and Speedvision at 35-37.

[90] *Time Warner v. FCC*, 240 F.3d at 1129-1130.

[91] *Id.* at 1130.

VII. CONCLUSION

For the foregoing reasons, Commenters respectfully request the Commission to consider the devastating impact that a digital must carry requirement would have not only on programming networks such as Commenters, but on the distribution of diverse programming. Any such requirement would not pass statutory or constitutional muster and would not serve the public interest.

Respectfully submitted,

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THE INSPIRATIONAL NETWORK, INC.
TGC, INC. d/b/a THE GOLF CHANNEL
SPEEDVISION NETWORK L.L.C.
OUTDOOR LIFE NETWORK, L.L.C.
THE WEATHER CHANNEL, INC.

June 11, 2001

[92] Roy Stewart, Chief, Mass Media Bureau, "Digital Television Transition," Presentation to the FCC, April 19, 2001 at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Carriage of Digital Television Broadcast Signals	CS Docket No. 98-120
Amendments to Part 76 Of the Commission's Rules	
Implementation of the Satellite Home Viewer Improvement Act of 1999:	
Local Broadcast Signal Carriage Issues	CS Docket No. 00-96
Applications of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	CS Docket No. 00-2

To: The Commission

DECLARATION OF LYLA PANIAGUA

I, Lyla Paniagua, Senior Manager, Cable and Broadcast/E-Commerce and Special Events, ABS-CBN International, Inc., d/b/a The Filipino Channel, hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Filipino Channel, The Golf Channel, INSP-The Inspiration Network, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain to The Filipino Channel are true and correct to the best of my knowledge, information and belief.

Lyla Paniagua

Lyla Paniagua
Senior Manager
Cable and Broadcast/E-Commerce and Special Events
ABS-CBN International, Inc., d/b/a The Filipino Channel

June 11, 2001

Before the
Federal Communications Commission
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To: The Commission

DECLARATION OF JUSTIN SMITH

I, Justin Smith, General Counsel, The Golf Channel, hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Filipino Channel, The Golf Channel, INSP-The Inspiration Network, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain to The Golf Channel are true and correct to the best of my knowledge, information and belief.

Justin Smith
General Counsel
The Golf Channel

June 11, 2001

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Carriage of Digital Television Broadcast Signals	CS Docket No. 98-120
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To: The Commission

DECLARATION OF DALE S. ARDIZZONE

I, Dale S. Ardizzone, Vice President of Business Affairs & General Counsel, The Inspirational Network, Inc., hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Filipino Channel, The Golf Channel, The Inspirational Network, Inc., Outdoor Life Network, Speedvision Network, and The Weather Channel", and the factual statements contained therein that pertain to The Inspirational Network are true and correct to the best of my knowledge, information and belief.

Dale S. Ardizzone
Vice President of Business Affairs
& General Counsel
The Inspirational Network, Inc.

June 11, 2001

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
Carriage of Digital Television Broadcast Signals	CS Docket No. 98-120
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Applications of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	CS Docket No. 00-2

To: The Commission

DECLARATION OF BECKY RUTHVEN

I, Becky Ruthven, Senior Vice President, Affiliate Sales, Outdoor Life Network, L.L.C. and Speedvision Network, L.L.C., hereby declare under penalty of perjury that I have reviewed the foregoing "Joint Comments Of The Filipino Channel, The Golf Channel, INSP-The Inspiration Network, Outdoor Life Network, Speedvision Network And The Weather Channel" and the factual statements contained therein that pertain to Outdoor Life Network and Speedvision Network are true and correct to the best of my knowledge, information and belief.

Becky Ruthven
Senior Vice President,
Affiliate Sales
Outdoor Life Network, L.L.C.
Speedvision Network, L.L.C.

June 11, 2001